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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 571

HERBERT STITH, ET AL, APPELLANTS,

v.

ED PINKERT, ET AL, APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

APPELLANTS' BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

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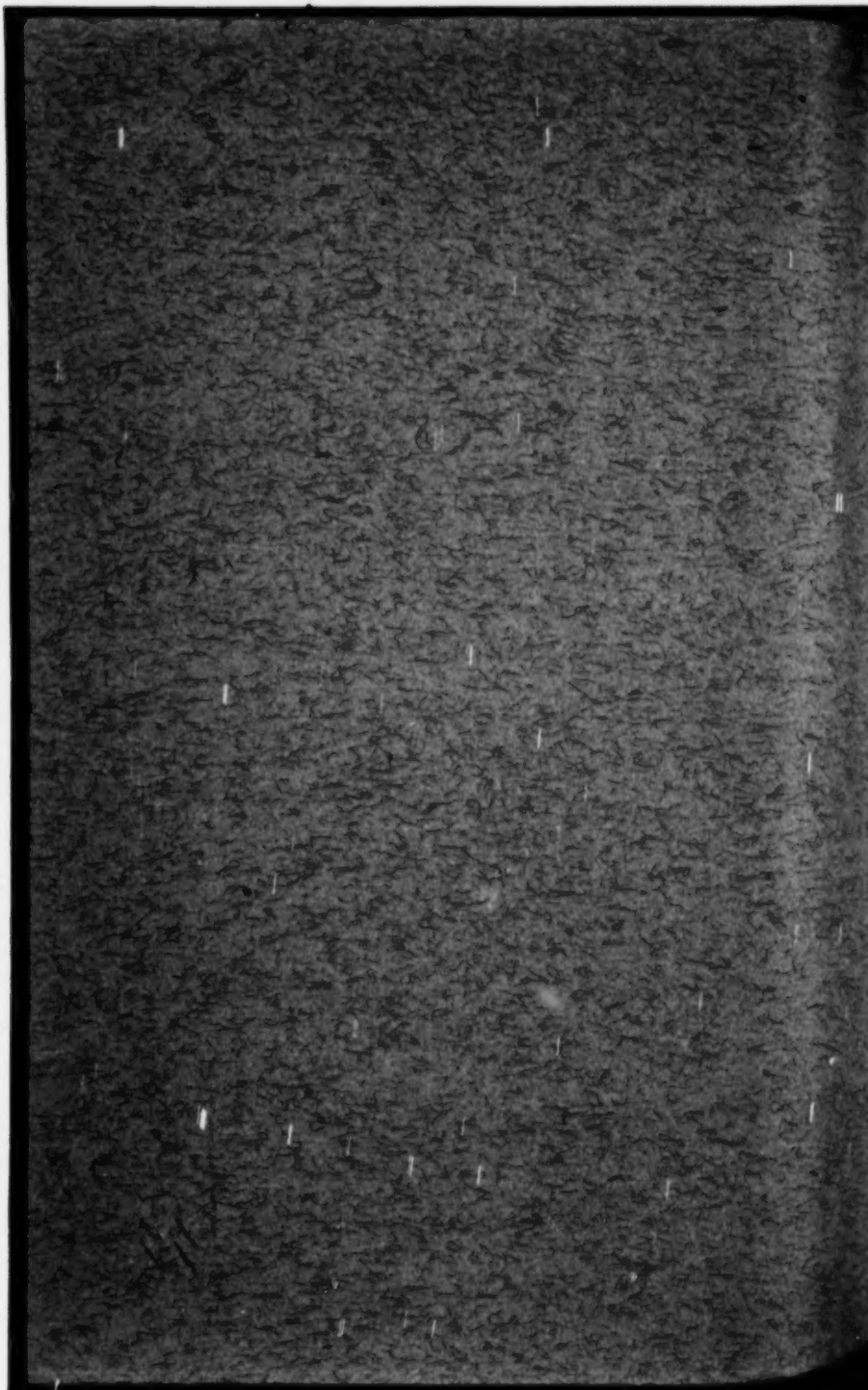

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OPINION BELOW

The opinion of the Supreme Court of Arkansas is not reported as yet in the official Arkansas Reports, but, is reported in the Law Reporter, Vol. 92, No. 16, page 642. A copy of the opinion is attached to Appellants' Statement As To Jurisdiction as Appendix A. A copy of the Motion to Rehear and the Order of the Supreme Court of Arkansas denying rehearing is attached to Appellants' Statement As To Jurisdiction as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on November 13, 1950 and the Order Denying Rehearing was entered on December 11, 1950. The Petition For Appeal was filed in the Supreme Court of Arkansas on December 29, 1950 and same was granted and allowed on the same date. The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1257 (2). In order not to unduly burden the Court with an endless repetition, we respectfully refer the Court to Appellants' Statement As To Jurisdiction which sets out fully the stage of the proceedings, the manner raised, and the method in which the Federal questions were raised, and the way in which they were passed upon by the Supreme Court of Arkansas. Briefly Act 207 of 1937, Acts of Arkansas, the application of the Act to the case at bar, the want of notice in the improvement district foreclosure proceedings, the want of notice in the sale of the lands involved herein, the owner of the lands not having had his day in court, were all raised and challenged in the complaint as being in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States; these questions were passed upon adversely to the contentions of Appellants by the Supreme Court of Arkansas as well as the lower court; and these same questions were raised again in the Motion To Rehear which was denied. The questions of the refusal of the Supreme Court of Arkansas to consider the Statutes In Pari Materia upon the same express subject in construing and applying Act 207 of 1937, Acts of Arkansas, thus placing a construction and application upon said Act 207 that is in violation of the due process clause of the 14th Amendment to the Constitution of the United States, the

sale of the lands by a commissioner after partial redemption of same, the Supreme Court of Arkansas' holding that there was no evidence of same, and the holding of the Supreme Court of Arkansas that Appellants were barred by Stare Decisis, all came as a surprise and could not be anticipated by Appellants and were raised and attacked for the first time in the Motion to Rehear upon the same grounds as the other questions above as being in violation of the 14th Amendment to the Constitution of the United States in violation of due process of law. (See Statement As To Jurisdiction pages 1-7 incl.).

QUESTIONS PRESENTED

These questions are briefly as follows: 1. Act 207 of 1937, Acts of Arkansas does away with the necessity of notice and makes it immaterial that the owner of lands be made a party to foreclosure suits by municipal improvement districts and is thus unconstitutional in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States; 2. The application of Act 207 of 1937 to a suit pending at the time of its passage is unconstitutional in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States; 3. *STITH* was not made a party to and had no notice of the proceedings wherein his lands were foreclosed and sold, notice to *SMITH* is not notice to *STITH, STITH* did not have his day in court, and thus his lands were taken in violation of due process of law in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States; 4. The notice of the sale of the lands involved herein did not name anyone as the owner and did not sufficiently

describe the lands to be sold, thus constituting no notice whatsoever and such want of notice is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States; 5. The application of Act 207 of 1937, Acts of Arkansas, by the Supreme Court of Arkansas without considering the Statutes In Pari Materia upon the same express subject, is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States; 6. The decision of the Supreme Court of Arkansas that there was no evidence that James H. Stith had attempted in good faith to redeem his lands during the period of redemption, when the record shows to the contrary, is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States; and, 7. The holding of the Supreme Court of Arkansas that Appellants were barred by Stare Decisis in *Pinkert* v. *Lamb*, 215 Ark. 879, is in violation of the due process clause of the Constitution of the United States.

All other questions set forth in the Assignment of Errors are also presented.

STATUTES INVOLVED

Act 207 of 1937, Acts of Arkansas; Act 85, Acts of Arkansas 1925; Sections 5677, 5678, 5679 and 5700, Crawford and Moses' Digest of the Statute of Arkansas, are set out in Appendix D attached to the Statement As To Jurisdiction, however the pertinent parts of same are set out in this brief pages 17 to 20 inclusive. Act 101, Acts of Arkansas 1937; Act 130, Acts of Arkansas 1939; Sections 17 and 18, Act 195, Acts of Arkansas 1949; are all set out in this brief pages 19 to 22 inclusive.

STATEMENT

It is undisputed that James H. Stith owned the lands involved in this appeal at the time Sewer Improvement District 94 foreclosed and sold said lands and that he died in 1942 leaving Appellants herein as his sole heirs at law. It is also undisputed that the original foreclosure suit was filed by the District in 1927 and that the lands involved herein were brought into the suit by an amendment to the complaint, filed July 18, 1935 for delinquent assessments due for the year 1934, wherein *James H. Smith* (and not *James H. Stith* the real owner) was named party defendant; that two years later in 1937 subsequent to the enactment of Act 207 of 1937, a warning order was published naming therein *JAMES H. SMITH* as the owner of the lands; that the decree rendered on November 23, 1937 named *JAMES H. SMITH;* that the notice of the sale did not name any person as the owner; that the lands were sold to the District in 1938; and that the real owner was *JAMES H. STITH,* who lived upon said lands and died in possession of same in 1942 during the period of redemption which expired in 1943; and it is further undisputed that Ella Stith, widow of James H. Stith, remained in possession of said lands until she was dispossessed by the Supreme Court of Arkansas in the case of *Pinkert* v. *Lamb,* 215 Ark. 879, opinion rendered October 17, 1949; and it is further undisputed that Appellants herein were never at any time parties to the suit of *Pinkert* v. *Lamb, supra.*

Appellants herein brought their suit attacking the validity of the foreclosure sale setting up in brief that the proceedings were void because James H. Stith, their father, was not a party to the foreclosure proceedings, did not have his day in court, had no notice of same even though

the Commissioners of the District knew from their own records that he owned the lands, that James H. Stith was the last owner of record, that the sale was void because the description of the lands in the notice of the sale was incorrect and insufficient and because the notice did not name anyone as the owner of the lands to be sold, that Act 207, Acts of Arkansas 1937 and its application to the case at bar and to the foreclosure proceedings which were pending at the time of its enactment, along with a number of other allegations, were all in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. The Chancery Court held for defendants-appellees and the plaintiffs-appellants appealed to the Supreme Court of Arkansas which again held for defendants-appellees affirming the decision of the Chancery Court.

The Supreme Court of Arkansas erred in holding:

1. That Act 207, Acts of Arkansas 1937, did not violate the due process clause of the 14th Amendment to the Constitution of the United States.

2. In holding that Act 207, Acts of Arkansas 1937, applied to the case at bar because the foreclosure proceedings attacked were pending at the time of the enactment of said Act 207.

3. In holding that notice to *SMITH* was binding upon *STITH*.

4. In holding that the not naming of the owner of the lands in the notice of the sale and the insufficient description of the lands to be sold in said notice of sale, was cured by the confirmation of the sale.

5. In failing to consider the statutes In Pari Materia upon the same express subject along with Act 207, Acts of Arkansas 1937, in construing and applying said Act 207 and thus by such failure to consider said Statutes placed an interpretation and application of said Act 207 that is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States.

6. In holding that there was no evidence in the record that James H. Stith had attempted in good faith to redeem his lands during the period of redemption.

7. In holding that plaintiffs-appellants are barred under the rule of Stare Decisis by the decision in the case of *Pinkert* v. *Lamb*, 215 Ark. 879.

SUMMARY OF ARGUMENT

Every person is entitled to his day in court and to be given notice of any proceedings wherein his land is being taken from him. When a foreclosure suit is filed under a law requiring the last owner of record to be made a party defendant in municipal improvement district foreclosure proceedings and subsequent to the filing of said suit the law is changed wherein constructive notice is substituted for personal notice and the subsequent law makes it immaterial that the correct name of the owner be stated in the proceedings, said subsequent law by its own terms not being retroactive but is prospective, then the application of said subsequent law to a suit pending at the time of its enactment is violative of the owner's rights and is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States.

Act 207, Acts of Arkansas 1937, according to the construction given it by the Supreme Court of Arkansas, does away with the necessity of notice to the landowners by providing that it is immaterial that the ownership of lands be incorrectly alleged. Said Act 207 does also provide that the *supposed owner* be made a party defendant and that the *supposed owner* be named in the warning order. These words and phrases in said Act 207 make said Act ambiguous. The *supposed owner* must be named in the proceedings and yet it is immaterial if the owner named is incorrectly given. If Act 207, Acts of Arkansas 1937 does away with the necessity of notice as the Supreme Court of Arkansas has construed it to mean, then said Act 207 is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. Appellants also contend that the Supreme Court of Arkansas erroneously construed said Act 207 by making it retroactive and also erroneously construed said Act 207 by failing to consider statutes In Pari Materia upon the same express subject and by such error placed an invalid construction upon said Act 207.

Notice of the pendency of the proceedings to *SMITH* is not notice to *STITH*. Then there was no notice as to the sale of the lands because the notice given did not name anyone as the owner and did not correctly describe the lands to be sold. This complete want of notice renders the foreclosure proceedings void from the beginning.

The purpose of this brief is not to duplicate the argument in the Statement As To Jurisdiction but is to oppose the Motion to Dismiss or Affirm of Appellees. Appellees contend that the case of *Ballard* v. *Hunter*, 204 U. S. 241, 51 L. Ed. 461 is conclusive of the issues in this appeal.

Appellants contend that *Ballard* v. *Hunter, supra,* is not conclusive of the issues herein and in fact does not apply to the case at bar.

All other points of law and questions set forth in the assignment of errors are also presented even though not argued in this brief and will be covered in the brief on the merits of this appeal.

ARGUMENT

I

The Case of Ballard v. *Hunter,* 204 *U. S.* 241, 51 L. Ed. 461 *Is Not Conclusive of the Issues in This Appeal.*

Appellees concede, on page 5 of their Motion to Dismiss or Affirm, "that "without some form of notice by personal or *substituted service*" a judgment would be void and the taking of the property thereunder would be in violation of the due process clause of the Constitution of the United States." It is undisputed: that the foreclosure proceedings in the case at bar were pending at the time Act 207, Acts of Arkansas 1937, was enacted; that *James H. Smith* was named in the complaint, notice of the pendency of the suit, and in the decree; that *James H. Stith* was the actual owner of the lands involved herein; that the notice of the sale of said lands did not name anyone as the owner of the lands; and it is contended by Appellants that the lands were incorrectly described in the notice of the sale of same, and Appellees do not seriously oppose this contention, but do say on page 10 of their Motion to Dismiss or Affirm, in concluding their argument:

> "So, in the present case, if it should be conceded that the description of the lands in the notice of the sale was erroneous (the Supreme Court of the State held that the description was not indefinite) such error or irregularity not being jurisdictional, would not take from the decree and the sale of the property the 'attribute of due process.' "

In proceedings in personam or in proceedings in rem, there must be notice by personal or substituted service, if such notice is defective so as to constitute no notice or so as to constitute a misleading notice then the proceedings are void as being in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. It is clear that notice to *SMITH* is not notice to *STITH*, the naming of *SMITH* in the complaint, warning order, and decree, certainly was not notice to *STITH* and *STITH* could not be bound thereby. *STITH* reading the warning order in the newspaper could not tell that he was a party to the proceedings and could not tell from said warning order that he was involved at all because the warning order notified *SMITH* to appear and defend. Notice to *SMITH* certainly would mislead *STITH* and this misleading notice rendered the proceedings void. *STITH* was an ignorant colored person and one could not expect him to know he was being sued when the published notice of the pendency of the action named *SMITH* and did not name *STITH*. Notice to *SMITH* is not notice to *STITH* and the lands of *STITH* were taken without notice in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. The notice of the sale did not name any person as the owner and described the lands in such a jumbled way that no person of average intelligence, much less *STITH*, an ignorant col-

ored person, could ascertain just what lands were to be sold. There was never any valid notice at any time. Such notices as were given actually constituted no notice whatsoever to *STITH* that his lands were to be foreclosed upon and sold. The notice of the sale was as follows:

> "The following described real estate, to-wit: Lots 21, 22, Block 1, lots 1 to 6 inclusive, 12, 13, 16, 17, Block 4, West 33 feet of East 66 feet of 1, 2, 3, 4, 5, 6, West one-half of 1, 2, 3, 4, 5, 6; 7 to 11 inclusive, Block 8, all in Adams Addition."

See opinion of the Supreme Court of Arkansas attached to the Statement As To Jurisdiction, Appendix A, page 5.

It is clear to the writer of this brief that no person of average intelligence, and certainly not *STITH*, an ignorant colored person, could ascertain just what lands that were to be sold. The description given above in the notice of the sale does not clearly show whether it is lots or blocks or just what is to be sold. *STITH'S* lands are correctly described as: the West half of Lots 1, 2, 3, 4, 5, and 6, Block 8, Adams Addition to the City of Little Rock, Arkansas. The notice of the sale given above does not contain the correct description of *STITH'S* land. If there was no notice as to the naming of *STITH* in the proceedings and the notice of the sale did not name him and did not correctly describe his lands, then there was no notice at all. There must be notice somewhere in the proceedings in order that the due process of law requirements are met with. But here *STITH* had no notice and was not named in the complaint, warning order, decree and the notice of the sale neither named *STITH* nor did it correctly describe the lands. There was just no notice whatsoever and the lands

of *STITH* were taken in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. These following cases clearly uphold Appellant's contentions on these points of law:

> *Marx* v. *Hanthorn*, 148 U. S. 172, 183, 184, 37 L.Ed. 410, 414; *Moses H. Scott* v. *John H. McNeal, et al*, 154 U. S. 34, 45, 46, 47, 38 L.Ed. 896, 901, 902; *Hale* v. *Finch*, 104 U. S. 261, 26 L.Ed. 732; *Gratiot County State Bank* v. *Johnson*, 249 U. S. 246, 63 L.Ed. 587; *Griffin* v. *Griffin*, 327 U. S. 220, 90 L.Ed. 635; and *Virginia and West Virginia Coal Co.* v. *Charles*, 251 Fed. 83.

In *Marx* v. *Hanthorn, supra*, this Court held that notice to *Ida J. Hawthorn* was not notice to *Ida J. Hanthorn* and the sale of *Hanthorn's* lands was void and that such notice was misleading. So it follows that notice to *SMITH* is not notice to *STITH* and the sale of *STITH'S* lands is void and such notice is misleading.

On the question of judgments in rem it is well to consider the principles set out in *Patton On Titles*, Section 257, Pages 819, 826 and 827, where it is clearly stated that property cannot be taken without due process of law, one essential of which is some form of notice of a hearing at which the matter will be judicially determined (page 819). Then on page 826 we find the following language:

> "The notice published must give in many states a sufficient description of the property involved in the action, and correctly state the relief asked, but need not name the defendants specifically, other than those who are served by publication. *They are sufficiently described if designated by the names under which they appear in the record chain of title,* (emphasis ours)

even if those names or incorrect or have since been changed by marriage or otherwise."

Then on page 827 we find this statement:

"There is no presumption to aid the record on such a purely statutory matter as constructive service of notice, and the files should therefore show affirmatively that publication, and proof thereof, was made in precisely the manner required by law." *Patton On Titles,* Sec. 257, pages 819, 826, 827.

As to constructive notice from the recording of instruments *Patton On Titles,* Section 55, pages 215, 216, we find that there is no constructive notice when two names, though pronounced alike begin with a different letter, or used in one instance as one whole word and in another instance separated so as to form a middle name or initial, such as Patrick Fitzpatrick in one instance and Patrick Fitz Patrick in another.

In the case at bar *JAMES H. STITH* was the record owner of the lands involved herein and yet in the foreclosure proceedings *JAMES H. SMITH* was notified to appear and defend. Notice to *SMITH* is not notice to *STITH.*

Defendants-appellees claim that the case of *Ballard* v. *Hunter,* 204 U. S. 241, 51 L. Ed. 461, is conclusive of the issues in this appeal and rely entirely upon this case. Appellees cite a number of cases holding that constructive service does not violate due process of law. That question is not before the Court at all and we agree that constructive service if strictly complied with and if given to the right parties and if it gives sufficient notice in the proper

time and manner, that such service is generally speaking valid. That question was not raised by Appellants at all. The question is that where a suit is filed and is pending under a law that requires personal service and subsequently an Act is enacted during the pendency of the suit that does away with personal service and provides for constructive service upon residents and provides that it is unnecessary or immaterial that the name of the person notified be incorrectly given, that such an Act if applied to such pending suit is invalid, both, because it changes the nature of the proceedings and because it does away with the necessity of the giving of sufficient notice. Also such an Act cannot be applied to such pending suit. These changes in the law applied to a suit that is pending violates a person's rights under the 5th and 14th Amendments to the Constitution of the United States. *Ballard* v. *Hunter,* 204 U. S. 241, did not cover these express points at all and did not cover the other points as to the misnomer of names presented here in this appeal.

In *Ballard* v. *Hunter, supra,* A. B. Ballard and Josephine W. Ballard were non-residents of the state of Arkansas and brought suit to set aside the sale of their lands by the foreclosure proceedings at the instance of the St. Francis Levee District, and contended that non-residents were entitled to be notified the same as residents by personal service claiming that the requirement of constructive service upon unknown owners and non-resident owners was in violation of due process of law. The principal point involved was the constitutionality of a special Act of the legislature that provided for personal service upon residents and constructive service upon unknown and non-resident owners of lands. The Court held that such pro-

visions were valid and that non-resident owners could not complain that they were given constructive notice and that the law did not require non-residents to be given personal service as to the pendency of the action. At no time did this Court pass upon the question of not naming the owner who is a resident in the notice published and this Court did not pass upon the question of a misleading notice being published wherein the name of the resident owner, who was known to the District to be the owner, was incorrectly stated. At no time did this Court pass upon the question of giving an Act a retroactive application when such Act was by its own terms not retroactive. The questions involved in *Ballard* v. *Hunter, supra,* are not involved in this appeal at all. The statute involved in *Ballard* v. *Hunter, supra,* was applied to non-resident and unknown owners of land and was not word for word the same as in the statute involved in the case at bar, even though several portions or parts of the statutes in both cases are somewhat similar. Yet the actual statute in the case at bar is different from that in *Ballard* v. *Hunter, supra,* and the facts are entirely different. The questions presented in this appeal are not the same questions as those passed upon in *Ballard* v. *Hunter, supra.* It is clear to the writer of this brief that *Ballard* v. *Hunter, supra,* does not apply to the case at bar and is not conclusive at all of the issues involved in this appeal.

Act 207, Acts of Arkansas 1937, contains no provision whatsoever that makes it retroactive, but, upon the contrary expressly provides that it shall be cumulative and supplemental to the laws in existence at the time of its enactment. No law is ever to be given a retroactive construction unless the language used in it will admit of no other construction. Act 207, Acts of Arkansas 1937, is by its own terms pros-

pective and is not retroactive at all and does not apply to the case at bar because the foreclosure proceedings wherein the land involved herein was sold was pending at the time of its enactment. The decision of the Supreme Court of Arkansas holding that Act 207 of 1937 was retroactive in effect and applied to the case at bar constitutes the taking of appellants' lands in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

On the question of statutory construction as to when an Act is retroactive and when it is not retroactive we quote from one of the leading authorities on the subject: *Sutherland Statutory Construction*, 3rd Edition, Horack, Section 2201, page 115:

> "Retrospective operation is not favored by the courts, however, and a law will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application."

Sutherland Statutory Construction, 3rd Edition, Horack, Section 2212, page 135:

> "Beginning with Kent's dictum in *Dash* v. *Van Kleeck*, it has been continuously reaffirmed that 'The rule is that statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction."

The law at the time the foreclosure proceedings wherein the lands involved herein were sold, provided for personal service upon residents and provided that the last owner of record be made a party defendant to the proceedings.

STITH was the last owner of record and was not personally served and was not made a party to the proceedings. Act 207, Acts of Arkansas 1937 was enacted while said proceedings were pending and by its own terms said Act 207 is not retroactive, therefore the decision of the Supreme Court of Arkansas holding that said Act 207 of 1937 is retroactive and that it applied to the case at bar is in grave error and should be reversed with directions.

II

The Historical Background of the Legislation Clearly Shows That the Legislature Did Not Intend to Do Away With the Necessity of Notice and the Necessity of Making the Last Owner of Record a Party Defendant to Foreclosure Proceedings in Municipal Improvement Districts.

In construing statutes it becomes necessary at times to consider prior and subsequent legislation upon the same express subject in order to determine the intention of the legislature and to determine the correct construction to place upon the statute under consideration. Statutes In Pari Materia are frequently read with the statute under consideration in order to properly construe the law. In order to correctly determine the law in the case at bar we quote below the pertinent provisions of prior and subsequent Acts along with Act 207 of 1937, Acts of Arkansas.

CRAWFORD AND MOSES' DIGEST OF THE STATUTES OF ARKANSAS

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Section 5677. Name of last owner. In suits to fore-

close the liens of assessments upon property in such improvement districts the name of the last owner of the property as it appears in the recorder's office shall always be given as the owner, and such party shall be made defendant, unless the commissioners know that some other party has acquired title; in which event such actual owner shall be made defendant. Act March 3, 1913, p. 527, §4.

Section 5678. Default decree. Summons shall be issued, and the defendant shall be required to appear and respond within five days after service; and upon default a decree shall be rendered against such property for the amount of such assessment, penalty and costs and an attorney's fee. Act March 22, 1881, p. 161, §10.

ACT 85, ACTS OF ARKANSAS, 1925

Page 251

Section 1. * * * * *

The said list shall include the name of the supposed owner as the same appears on the tax books, a description of the property, and the amount of the tax due thereon, to which list the said collector shall append his affidavit that the same are true and correct, and said affidavit shall also state the time the said list became delinquent. * * * * *

Section 6. When the board of commissioners, or any one authorized by law to file suit for the collection of such delinquent taxes desire to commence said suit, they shall obtain a certified copy of the remaining delinquent property on said list from the clerk which shall be filed with the complaint, or within 10 days thereafter, and taken as part thereof. * * * * *

ACT 101, ACTS OF ARKANSAS 1937

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Section 1. That section No. 5679 of Crawford and Moses' Digest of the Statutes of Arkansas be, and the same is hereby amended to read as follows: "Notice of the pendency of said suit shall be given by publication weekly for two (2) weeks before judgment shall be entered for the sale of such lands in some newspaper published in the County where such suit is pending, which published notice may be in the following form: 'COMMISSIONERS OF IMPROVEMENT DISTRICTS vs. DELINQUENT LANDS.' "All persons having a claim and interest in any of the following described lands are hereby notified that suit is pending in the Chancery Court in_____ County, Arkansas, to enforce the collection of certain improvement district assessments on the following list of lands, the names of each supposed owner having been set opposite together with the amount of taxes due on each tract,_____"

Section 11. (repeals Sections 5679 and 5682 of Crawford and Moses' Digest of the Statutes of Arkansas.)

Section 111. (provides that the purpose of the act is to reduce the expense of foreclosure proceedings in municipal improvement districts.)

ACT 207, ACTS OF ARKANSAS 1937

Page 758

AN ACT to Amend and Supplement the Law Governing the Foreclosure of Liens for Assessments Due in Municipal Improvement Districts, and Other Purposes.

Section 2. * * * * * Said proceedings and judgment shall be in the nature of proceedings in rem, and it shall

be immaterial that the ownership of said lands, * * * be incorrectly alleged in said proceedings, and such judgment shall be enforced wholly against such property, and not against any other property or estate of said defendant * * *

Section 3. (provides for a warning order to be published weekly for four weeks.) * * * * *

All persons, firms, or corporations having or claiming an interest in any of the following described lands,..... ....., are hereby notified and warned that suit is pending in the Chancery Court of.....County, Arkansas, to enforce the collection of certain.....taxes or assessments on the subjoined list of lands each supposed owner having been set opposite his or her or its lands .....(Then shall follow a list of supposed owners, with a description of each separate property that is delinquent, and amount due thereon respectively as aforesaid).....

Section 4. (provides for the lands to be sold after published notice weekly for two weeks.)

Section 8. (provides that the Act is supplemental to the laws now in force.)

Section 9. (provides that the Act is cumulative.)

Section 10. (provides that the purpose of the Act is to reduce the expense and costs of foreclosure proceedings.)

ACT 130, ACTS OF ARKANSAS 1939

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Section 1. (merely amends Section 7315 Pope's Digest, Act 207 of 1937, Section 3 to provide for publication of the warning order for two weeks instead of four weeks as required in Act 207 of 1937, Section 3. The other wording

in the form of notice is in exact language a duplication of Section 3, Act 207, 1937 and states in part as follows; "(Then follows a list of supposed owners, with a description of each separate property that is delinquent . . . . . .).

Section 2. (provides that the purpose of the Act is to reduce the expense in foreclosure proceedings.)

ACT 195, ACTS OF ARKANSAS 1949

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AN ACT to Provide More Protection For the Owners of Property Located Within Municipal Improvement Districts: and for Other Purposes.

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Section 17. Before filing suit to collect delinquent installments, The Board of Commissioners shall obtain from the Clerk of the Chancery Court or the officials having the delinquent list a certified list of all lots, blocks and parcels of land unredeemed. This list shall contain the description and the name of the supposed owner. * * * The Board of Commissioners shall submit said list to a competent abstractor who shall compile a list of the names and last known addresses of the owners of record of all tracts included in the list prepared by the clerk and shall certify as to the source of the addresses furnished by him. * * * Certified copies of both lists shall be attached as exhibits to the complaint. Twenty days prior to the filing of the complaint the Board shall cause to be mailed, by registered mail with return receipt requested, to each record owner as listed by the abstractor, a notice describing the delinquent property, specifying the year of delinquency, and the amount or the approximate amount necessary for redemption, and informing the owner as to the date on which the suit will be filed. As an exhibit to the Complaint there

shall be attached an affidavit of the person or persons who mailed the notices; said affidavit shall set forth a copy of the notice, show the date the notices were mailed, the names and addresses, of the last owners of record and to whom the notices were mailed, and a list of all notices which, because of insufficient addresses, were returned prior to the filing of the Complaint. * * *

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Section 18. * * * * *

Such proceedings shall in nature be in rem, and insofar as the rights of the purchaser are concerned, it shall be immaterial that the ownership of the lots, blocks or parcels of land be incorrectly alleged in the proceedings. The decree shall be enforceable only against the property and not against any other property or estate of the defendants or the true owners of the delinquent property. * * *

After considering fully all the above quoted statutes we find that in Section 5677 of Crawford and Moses' Digest of the Statutes of Arkansas that the *last owner of record* must be made a party defendant to the foreclosure proceedings; that Act 85 of 1925, Acts of Arkansas requires that the *supposed owner as the same appears on the tax books* must be made a party defendant; that Act 101, Acts of Arkansas 1937, requires that the *supposed owner* be named in the proceedings; that Act 207, Acts of Arkansas 1937, requires that the *supposed owner* be named in the proceedings and provides that it shall be *immaterial* that the ownership be incorrectly alleged in the proceedings; that Act 130, Acts of Arkansas, 1939, requires that the *supposed owner* be named in the proceedings; that Act 195, Acts of Arkansas 1949, requires that the *last owner of record* be given notice of the proceedings and be made a party defendant and provides that it shall be *immaterial* that the owner-

ship of the lands be incorrectly alleged in the proceedings. What did the legislature mean and intend by the use of the words: LAST OWNER OF RECORD, SUPPOSED OWNER, and IMMATERIAL THAT THE OWNERSHIP BE INCORRECTLY ALLEGED?

We find that the words LAST OWNER OF RECORD and SUPPOSED OWNER mean one and the same thing. One would suppose that the last owner of record really owned the land and one has constructive notice of ownership as is shown in the recorder's office. There is no other meaning to give these words than that the word *supposed owner* was meant to mean the *last owner of record.* Both terms are used in all the statutes and in the last one Act 195 of 1949, Acts of Arkansas, both terms are clearly shown to mean the same thing. Now take the word *immaterial* as is used in all the statutes quoted above, we find that in the last, Act 195 of 1949, that after providnig that the *last owner of record* must be notified of and be made a party to the proceedings and that it shall be *immaterial* if the ownership of the lands be incorrectly alleged therein. Now what is the meaning of this combination of terms? We find that the only logical interpretation to place upon this is that if the *last owner of record* is made a party to and given notice of the proceedings then it shall be *immaterial* (and then only) that the ownership be incorrectly alleged in the proceedings. Act 207 of 1937 did not expressly repeal Section 5677 of Crawford and Moses' Digest which requires the *last owner of record* to be made a part to the proceedings, nor was said Section 5677 repealed by implication. *Supposed owner* means *last owner of record.* Thus it is clear in the mind of the writer of this brief that the law, at the time the land involved in this action was sold,

required the last owner of record to be made a party to the proceedings. *James H. Stith,* now deceased, father of appellants herein, was the *last owner of record* and his correct name and address was shown in the tax records of the improvement district itself, and yet he was not made a party to those proceedings and was not given notice of same. Such was not due process of law.

It is proper to consider and read together prior laws and subsequent laws along with the law under consideration in order to correctly determine what the law is. Statutes In Pari Materia should be considered in construing a certain statute. *Sutherland Statutory Construction,* 3rd Edition, Horack, Section 5202, page 539; *Vane* v. *Newcombe,* 132 U. S. 220, 235, 33 L.Ed. 310, 315; *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 309, 55 L.Ed. 738, 747; *Boston Sand & Gravel Co.* v. *United States,* 278 U. S. 41, 73 L.Ed. 170; *Roberts* v. *Tice,* 198 Ark. 397; *LaFargue* v. *Waggoner,* 189 Ark. 757, 763, 764.

The authorities above quoted are decisive on this question of statutory construction. In a footnote to the opinion of the case at bar the Supreme Court of Arkansas stated that Act 130 of 1939 and Act 195 of 1949 did not apply to the case at bar because they were passed subsequently to Act 207 of 1937 (see Statement As To Jurisdiction, Appendix A, p. 4). The Supreme Court of Arkansas is in error in their construction of the statute. In the case at bar the Supreme Court of Arkansas held that Act 207 of 1937 stood alone and in construing it as standing alone, held that it made no difference who was named in the proceedings as long as some one was named. This is the effect of the decision in the case at bar. If this be true then one might

name his pet dog ROVER as the owner of the lands and then take same from the owner of record or the real owner. Such was not the intention of the legislature and such was not the true construction of the statute.

We submit that it is clear that the decision in the case at bar is in error and that the Supreme Court of Arkansas by such error placed a construction upon Act 207 of 1937 that renders said Act invalid in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed and remanded with directions that title to the lands involved herein be fixed in Plaintiffs-Appellants and that Defendants-Appellees account to Plaintiffs-Appellants for the rents collected by them.

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